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ORIGINAL

August 31, 2007

BY HAND DELIVERY AND ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas, WC Docket No. 07-97
REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

On behalf of Covad Communications Group, NuVox Communications, and XO Communications, LLC (collectively "Commenters") enclosed for filing in the above-referenced proceeding are two copies of the redacted version of the Commenters' Initial Comments. A copy of these redacted Initial Comments is also being submitted via the Federal Communications Commission's Electronic Comment Filing System.

In accordance with paragraph 14 of the *Second Protective Order*, dated June 1, 2007 (DA 07-2293), one copy of the Initial Comments which contain Highly Confidential information is being submitted to your attention under separate cover letter. Two copies of the Highly Confidential Filing are also being submitted, by hand delivery, to Mr. Gary Remondino of the Wireline Competition Bureau.

Kindly date stamp the duplicate of this letter and return it to the courier.

Please contact the undersigned at (202) 342-8531, if you have any questions about this letter.

Respectfully submitted,

Genevieve Morelli

Genevieve Morelli
Counsel to Covad Communications, Group, NuVox Communications, and XO Communications, LLC

Enclosures

REDACTED - FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas	)))))	WC Docket No. 07-97

INITIAL COMMENTS OF COVAD COMMUNICATIONS GROUP, NUVOX COMMUNICATIONS, AND XO COMMUNICATIONS, LLC

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August 31, 2007

PUBLIC VERSION

REDACTED FOR INSPECTION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas	))))))	WC Docket No. 07-97

INITIAL COMMENTS OF COVAD COMMUNICATIONS GROUP, NUVOX COMMUNICATIONS, AND XO COMMUNICATIONS, LLC

Pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on July 6 , 2007,[1] Covad Communications Group, NuVox Communications, and XO Communications, LLC (hereinafter referred to jointly as "Commenters"), by their attorneys, hereby file their comments in response to the four petitions filed by Qwest Corporation ("Qwest") on April 27, 2007, pursuant to Section 10 of the Communications Act of 1934, as amended,[2] requesting that the Commission forbear from applying to Qwest certain obligations in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas ("MSAs").[3]

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1 *Wireline Competition Bureau Grants Extension of Time to File Comments on Qwest's Petitions for Forbearance in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Public Notice, DA 07-3042 (rel. Jul. 6, 2007).

2 *See* 47 U.S.C. § 160.

3 Qwest seeks forbearance from the loop and transport unbundling regulations contained in Sections 251(c)(3) and 271(c)(2)(B)(ii). Qwest also seeks forbearance from the dominant carrier tariff requirements set forth in Part 61 of the Commission's rules; from price cap regulations set forth in Part 61 of the Commission's rules; from the Computer III requirements, including Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") requirements; and from dominant carrier requirements arising under Section 214 of the Act and Part 63 of the Commission's rule concerning the process for acquiring lines, discontinuing services, making assignments or transfers of

I. INTRODUCTION AND SUMMARY

The Commission should summarily dismiss Qwest's Petitions because the "evidence" submitted by Qwest to support its forbearance requests is not sufficiently detailed and market-specific to meet its burden of proof. Such shortcomings are particularly fatal here since Qwest should be very familiar with the evidentiary requirements for forbearance from its proceeding regarding forbearance in the Omaha MSA.[4] The Commission should not tolerate Qwest's intentional refusal to produce adequate evidence and should take such failure as an admission by Qwest that its Petitions are insufficient and should be dismissed.

If the Commission declines to dismiss the Petitions, it should deny Qwest the forbearance it seeks on the merits because Qwest clearly has not met the statutory prerequisites for forbearance contained in Section 10 of the Act. A grant of forbearance by the Commission is lawful only if the Qwest Petitions demonstrate that substantial actual facilities-based competition exists for each relevant product market, and within each relevant geographic market. The Qwest Petitions rely only on the most general information; Qwest does not proffer any of the market-specific data necessary to support its forbearance claims. Moreover, the Qwest Petitions

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control. *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Colorado Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007), at 3-4 ("*Qwest Petition – Denver*"); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007), at 3-4 ("*Qwest Petition – Minneapolis*"); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007), at 3-4 ("*Qwest Petition – Phoenix*"); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle, Washington Metropolitan Statistical Area*, WC Docket No. 07-97 (filed Apr. 27, 2007), at 3-4 ("*Qwest Petition – Seattle*").

4 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *aff'd Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450, (D.C. Cir. Mar. 23, 2007).

improperly rely on overly general information, including line loss and market coverage figures, without providing any data regarding the actual market presence of competing telecommunications service providers.

With regard to Qwest's requests for relief from Part 61 dominant carrier tariffing requirements; dominant carrier requirements under Section 214 of the Act and Part 63 of the Commission's rules; and the Commission's *Computer III* requirements, including CEI and ONA requirements, the Qwest Petitions lack *any* analysis of the statutory requirements of Section 10. Significantly, the Petitions do not address whether Qwest maintains market power within the markets subject to its forbearance requests, nor do the Petitions discuss supply and demand elasticities, or Qwest's costs, resources, structure and size within those markets. Absent any such analysis, a grant of forbearance by the Commission for those non-Section 251 dominant carrier obligations is not justified.

The Commission must consider whether a grant of forbearance would leave providers of competing telecommunications services without meaningful wholesale alternatives, including the network facilities and services that Qwest must offer pursuant to Section 271 of the 1996 Act. Qwest has sought to evade its Section 271 obligations. Moreover, Qwest fails to negotiate in good faith commercial contracts that govern the rates, terms, and conditions of its Section 271 offerings. At bottom, Qwest has not shown that its treatment of its obligations under Section 271 would provide a sufficient backstop to protect consumers and competition if Section 251(c)(3) unbundling were to be granted by the Commission.

It is also clear that the Qwest Petitions are not consistent with the public interest, and therefore do not satisfy the third prong of the Section 10(a) test. Qwest offers no evidence that the regulations at issue are hindering its ability to compete. Rather, despite the costs of

unbundling, competition and consumer interests will continue to benefit from unbundling throughout the four MSAs. Indeed, the evidence is compelling that competitive conditions in these MSAs are such that continued unbundling is required because market forces alone cannot be relied upon to sustain competition. In making its public interest determinations, Section 10(b) requires the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. The Commission must not only establish that forbearance would not unduly *harm* consumers and competition, it also must find that substantial competitive *benefits* would arise from forbearance. Qwest has failed to establish such benefits would accrue to the public and, accordingly, the Commission should conclude that the Section 10 standard has not been met.

In addressing Qwest's Petitions, the Commenters discuss the Commission's previous decisions on similar forbearance petitions for the Omaha and Anchorage MSAs.[5] The Commenters caution the Commission, however, to bear in mind its statements in the *Omaha Forbearance Order* and the *Anchorage Forbearance Order* that its findings were limited to the specific facts and circumstances in existence in those particular MSAs and that its decisions did not establish "rules of general applicability."[6] In deciding both the Omaha and Anchorage forbearance petitions, the Commission emphasized that it was not "issu[ing] any declaratory rulings, promulgat[ing] any new rules, or otherwise mak[ing] any general determinations"

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5 *See Omaha Forbearance Order*; *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended, for Forbearance From Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007) ("*Anchorage Forbearance Order*").

6 *Anchorage Forbearance Order*, at ¶ 1.

regarding forbearance.[7] This fact is particularly critical here, given the major differences in the size, scope, and importance of the markets involved in the current proceeding as compared to the Omaha and Anchorage MSAs.[8]

Moreover, the Commenters urge the Commission to take notice of the fact that the predictive judgment it employed in reaching the decision to grant Qwest's forbearance in certain wire centers in the Omaha MSA has proven incorrect. The Commission's assumption that Qwest would offer wholesale access to its dedicated facilities on reasonable terms and conditions once released from the legal mandate of Section 251(c)(3) has proven inaccurate. The Commission should take into account Qwest's aggressive post-forbearance attempts in Omaha to stifle competition that relies on continued use of its last-mile facilities in determining whether forbearance is warranted here.

II. THE STANDARD FOR ANALYSIS OF FORBEARANCE PETITIONS IS WELL ESTABLISHED

Section 10(a) of the Act allows the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, if the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;

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7 *Omaha Forbearance Order*, at ¶ 14.

8 The Commenters also note that parts of these comments address the *Anchorage Forbearance Order* notwithstanding the fact that the Commenters have moved the Commission to vacate the *Order* on the ground that no case or controversy continues to exist, rendering the *Order* meaningless and unnecessary. *See* Motion to Vacate, WC Docket No. 05-281 (filed Jul. 5, 2007). The motion remains pending.

> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[9]

The D.C. Circuit and the Commission have made it clear that all three prongs of the forbearance standard must be met for forbearance to be permissible.[10] The three prongs are conjunctive and the Commission must deny any petition which fails to satisfy any single prong.[11] In making its determinations, the Commission must consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services."[12]

Further, the burden of proof in a forbearance proceeding rests squarely on the petitioning party.[13] The petitioning party must "provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards."[14] Anecdotes cannot sustain a petitioning party's burden of demonstrating that the regulations or provisions in question are unnecessary and forbearance is consistent with the public interest.[15] Instead, a petitioning party must provide detailed, market-specific evidence. Moreover, as the Commission

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9 47 U.S.C. § 160(a).

10 *See Petition for Forbearance From E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers Under Rule Section 20.18(H)*, Order, 18 FCC Rcd 24648, 24653 (2003) ("*E911 Forbearance Order*"); *see also Cellular Telecommunications & Internet Ass'n v. FCC,* 330 F.3d 502, 509 (D.C. Cir. 2003).

11 *E911Forbearance Order*,18 FCC Rcd at 24653.

12 47 U.S.C. § 160(b).

13 *E911 Forbearance Order*, 18 FCC Rcd at 24658.

14 *Id.*

15 *Id.*

emphasized in the *Omaha Forbearance Order*, it is under no statutory obligation to evaluate a forbearance petition "otherwise than as pled."[16] While general unsupported claims are never sufficient to support forbearance, unsubstantiated claims are especially lacking in situations – like the present case – where the Commission has already found (and been upheld by the courts) that telecommunications carriers are impaired without access to the unbundled loops and dedicated transport from which the petitioning party seeks forbearance.

The Commission has stated repeatedly that forbearance determinations do not result in rules of general applicability.[17] Indeed, the Commission has professed its understanding that forbearance proceedings are not the appropriate context in which to craft any new regulatory tests that would apply generally to the industry. In the *Omaha Forbearance Order*, the Commission expressly stated:

> We emphasize, however, that in undertaking this analysis, we do not issue any declaratory rulings, promulgate any new rules, or otherwise make any general determinations of the sort we would properly make in a rulemaking proceeding on a fuller record.[18]

And in the more recent *Anchorage Forbearance Order*, the Commission reiterated that "each case must be judged on its own merits."[19] In deciding whether to grant ACS of Anchorage, Inc. ("ACS") forbearance from Section 251(c)(3) and 252(d)(1) obligations, the Commission explicitly confirmed that it was adopting "no rules of general applicability."[20]

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16 *Omaha Forbearance Order*, at n. 161.

17 *Id. See also Anchorage Forbearance Order*, at ¶ 11 (2007).

18 *Omaha Forbearance Order*, at ¶ 14. *See also Anchorage Forbearance Order*, at ¶ 11.

19 *Anchorage Forbearance Order*, at ¶ 1.

20 *Id.*

Notwithstanding such clear statements, Qwest in effect urges the Commission to grant it forbearance solely because relief similar to the relief requested here was granted in the earlier *Omaha Forbearance Order*. In lieu of detailed data that addresses each of the specific statutory requirements, Qwest's Petitions are filled with mere citations to the *Omaha Forbearance Order*.[21] It is never sufficient for a requesting party to maintain that its request should be granted because of a successful forbearance request made previously for another market.[22] Each forbearance request must be judged on its own merits and must rise or fall based on empirical evidence regarding the particular product and geographic markets for which regulatory relief is being sought.

Presuming the Commission chooses to analyze Qwest's current Petitions for Section 251(c)(3) forbearance under the *Omaha Forbearance Order* framework, such analysis requires (among other things) the petitioning party to show that competitive carriers have constructed competing last-mile facilities and that each of those competitive carriers is willing and able to use their facilities, including their own loop facilities, within a commercially reasonable period of time to provide a full range of services that are substitutes for the incumbent local exchange carrier's ("ILEC's") local service offerings to 75% of the end user locations in each wire center.[23] The Commission has determined that such levels of "coverage" were required to ensure that "significant competition from competitors that do not rely heavily on [the

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21 There are two dozen references to the *Omaha Forbearance Order* in each of the four Qwest Petitions.

22 *See Omaha Forbearance Order*, at ¶ 14; *Anchorage Forbearance Order*, at ¶ n. 28.

23 *Omaha Forbearance Order*, at n. 156, ¶ 69.

ILEC's] wholesale services"[24] is present before forbearance is granted. As stated by the Commission in the *Omaha Forbearance Order*:

> We find that forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing "last-mile" facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Omaha MSA.[25]

The facilities coverage requirement likewise was applied in the *Anchorage Forbearance Order*, where the Commission "tailor[ed] ACS's relief to those locations where the record indicates that GCI provides sufficient facilities-based competition to ACS to satisfy the forbearance criteria of section 10(a)."[26] More specifically, ACS was granted forbearance only in "wire center service areas where GCI's voice-enabled cable plant covers at least 75% of the end user locations that are accessible from that wire center."[27]

Qwest's efforts to bootstrap these Petitions to the pre-forbearance situation in the Omaha MSA is particularly egregious given the major differences in the size, scope and importance of the markets involved in the current proceeding as compared to the Omaha MSA. In Omaha, there are only 24 wire centers, and the U.S. Census Bureau ranks the Omaha-Council Bluffs MSA the 60th largest MSA in the country.[28] The entire population of the five counties in

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24 *Id.*, at ¶ 60.

25 *Id.*

26 *Anchorage Forbearance Order*, at ¶ 21.

27 *Id.*

28 *See Omaha Forbearance Petition*, at n. 3; *OMB Bulletin 07-01Update of Statistical Area Definitions and Guidance on their Uses,* U.S. Office of Management and Budget (Dec. 18, 2006) ("*OMB Bulletin*"), *available at* http://www.whitehouse.gov/omb/bulletins/fy2007/b07-01.pdf.

Nebraska and Iowa that comprise the Omaha MSA is approximately 820,000.[29] In contrast, the four MSAs at issue here – Phoenix, Seattle, Minneapolis-St. Paul, and Denver – are some of the largest population centers in the country. They vary in population from 4.04 million (Phoenix) to 2.4 million (Denver) and have a combined population of nearly 13 million.[30] These MSAs, as a group, contain 191 wire centers, eight times the number of wire centers at issue in the *Omaha Forbearance Order*. The implications of the current Petitions are quite dramatic and the Commission therefore must be especially careful to ensure that the statutory requirements for forbearance have been met by Qwest and that a grant of forbearance would serve the public interest.[31]

III. THE PETITIONS SHOULD BE DISMISSED DUE TO THE GROSS INADEQUACIES OF THE SUPPORTING DATA FILED BY QWEST

A. The Evidence Produced by Qwest Does Not Meet Its Burden of Proof

As noted above, the party requesting forbearance has the burden of proof to show that the regulations or provisions in question are unnecessary and forbearance is consistent with the public interest. To meet this burden, the petitioner must produce detailed, market-specific

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29 *OMB Bulletin*.

30 *Id.* These MSAs are the 13th largest (Phoenix-Mesa-Scottsdale), 15th largest (Seattle-Tacoma-Bellevue), 16th largest (Minneapolis-St. Paul-Bloomington), and 21st largest (Denver-Aurora) MSAs in the United States.

31 In establishing the Section 251(c)(3) unbundling rules for loops and transport in the *Triennial Review Order* and the *Triennial Review Remand Order*, the Commission did not contemplate that Section 10 would be used in the sweeping manner Qwest is attempting here. The Commission acknowledged that there may be discrete geographic markets where a Section 251(c)(3) forbearance petition is warranted, but those situations were to be the exception and the loop and transport unbundling rules adopted in the *TRO* and the *TRRO* were intended to apply generally to the ILECs' local exchange operations. Here, Qwest's proposed relief (*i.e.*, the exception) threatens to swallow the rule and render the Commission's unbundling requirements meaningless in a substantial portion of the Qwest incumbent local operating territory. *See Unbundled Access to Network Elements*; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 39 (2005) ("*TRRO*"), *affirmed Covad Communications v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

evidence for the particular product and geographic markets for which forbearance is sought. Qwest has failed miserably to meet its burden. The data contained in Qwest's Petitions and accompanying materials suffers from two principal defects in this regard.

First, the data provided by Qwest in support of its Petitions is largely anecdotal. Qwest urges the Commission to grant forbearance on the basis of promotional materials, marketing statements, and broad generalizations concerning the state of competition in the particular MSAs at issue. Reliance on this type of information to justify forbearance, coupled with an ill-founded reliance on Qwest's competitive predictions concerning the future competitive landscape, would result in a disposition of these Petitions that is twice removed from reality.

For example, to support its position that there is sufficient competition by cable providers to justify forbearance in the mass market throughout the Denver, Minneapolis-St. Paul, Phoenix, and Seattle MSAs, Qwest relies predominantly on self-promotional statements, including the statement by Comcast's co-chief financial officer that over the next three years "it is entirely conceivable and even probable that [Comcast] could add 10 million phone customers."[32] Similarly, in support of its position that there is sufficient competition by cable providers in the enterprise market, Qwest cites Cox's claims that it "is in a unique position in the commercial services arena. All of our pieces . . . contribute to the sense of trust that our customers have with us."[33] Statements made by Comcast, Cox, and other cable executives in

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32 *Declaration of Robert H. Brigham and David Teitzel Regarding the Status of Telecommunications Competition in the Seattle, Washington Metropolitan Statistical Area* ("*Brigham/Teitzel Declaration - Seattle*"), at ¶ 18, *quoting* http://marketwatch.com/news/story/comcast-confident-cable-phone-war/story.aspx?guid={F8C09A0C-9A88-4057-AD62-3917AB81D79F}.

33 *See, e.g., Brigham/Teitzel Declaration - Seattle*, at ¶ 17, *quoting* http://www.coxbusiness.com/pressroom/pressreleases/2003-1027.html.

marketing materials,[34] in press releases,[35] and at investor conferences[36] round out the picture Qwest sketches of the state of competition by cable-based providers in the four MSAs at issue. *Company press releases, investor relations materials, media reports, and marketing pieces are not* the type of evidence upon which the Commission can base its forbearance determinations. Qwest's Petitions are virtually devoid of the hard data regarding the competitive environment that must be provided by any carrier realistically hoping to prevail through the forbearance process. For this reason, Qwest's Petitions should be denied.

The second critical defect in the "proof" submitted by Qwest is that the very limited data regarding the state of competition Qwest has actually produced is not specific enough. This shortcoming renders the data essentially useless to the Commission's forbearance analysis and shows that Qwest has not made the required *prima facie* showing. For example, Qwest has failed to provide evidence of competition at the wire center level, the geographic market used for determining the level of competition in a Section 251(c)(3) forbearance analysis

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34 *See, e.g., Brigham/Teitzel Declaration – Seattle*, at ¶ 18, quoting a Cox mailer advertising its Digital Voice Service. *See also Brigham/Teitzel Declaration – Minneapolis-St. Paul*, at ¶ 17, citing a Comcast direct mail advertising piece.

35 *See, e.g., Brigham/Teitzel Declaration – Seattle*, at ¶ 14, quoting a Cox news release stating that its Digital Telephone service would be deployed across its entire network infrastructure by the end of 2006.

36 *See, e.g., Declaration of Robert H. Brigham and David Teitzel Regarding the Status of Telecommunications Competition in the Minneapolis-St. Paul, Minnesota Metropolitan Statistical Area* ("*Brigham/Teitzel Declaration – Minneapolis-St. Paul*"), at ¶ 16, quoting statements by Comcast Chairman and CEO Brian Roberts in a presentation at a Citigroup Entertainment, Media and Telecommunications Conference. *See also Declaration of Robert H. Brigham and David Teitzel Regarding the Status of Telecommunications Competition in the Denver, Colorado Metropolitan Statistical Area* ("*Brigham/Teitzel Declaration – Denver*"), at ¶ 16, quoting statements by Comcast executives in a presentation at a Citigroup Entertainment, Media and Telecommunications Conference.

in the *Omaha Forbearance Order*.[37] With one exception,[38] the data Qwest has submitted in support of its Petitions is presented on an MSA (or even more aggregated)[39] basis. Given Qwest's prior experience with forbearance petitions of this very nature, Qwest's failure to submit appropriate market-specific data at the outset evidences bad faith and an attempt to "game" the forbearance process.

In the *Triennial Review Remand Order*, the Commission determined that the proper geographic market for analyzing local competition under Section 251(c) was the LEC wire center.[40] The Commission stated:

> We recognize that some imperfections are inherent in any approach we might adopt, and conclude that the other proposed geographic tests have greater defects than the one we select . . . an MSA-wide approach relying on objective, readily-available data would alleviate dramatically any concerns regarding administrability, but (as we also describe below) would require an inappropriate level of abstraction, lumping together areas in which the prospects for competitive entry are widely disparate.[41]

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37 *See Omaha Forbearance Order*, at ¶¶ 61-62; *Anchorage Forbearance Order*, at ¶ 14 ("As in the *Qwest Omaha Order*, we conclude that it is appropriate for us to use the wire center service area as the relevant geographic market.").

38 **[BEGIN REDACTION]**

[END REDACTION]

39 Some of the data proffered by Qwest is nationwide in scope. *See, e.g., Brigham/Teitzel Declaration – Denver*, at ¶ 16 ("In September 2006, Comcast reported that it was expecting to add 1.3 million to 1.4 million digital phone customers nationally for the year versus 1 million additions it had previously estimated."). *See also* Qwest Petition – Seattle, at 7 ("At a national level, Comcast expects its telephone subscriber base to grow by nearly 400% between 2007 and 2010.").

40 *See Triennial Review Remand Order*, at ¶ 155-56.

41 *Triennial Review Remand Order*, at ¶ 155.

Consistent with this standard, in the *Omaha Forbearance Order*, the Commission based its Section 251(c)(3) forbearance analysis in part on competitive coverage at the wire center level.[42] This approach was followed in the Anchorage forbearance proceeding. There, the Commission granted ACS forbearance from Section 251(c)(3) unbundling obligations in five of the 11 wire centers in the Anchorage study area, finding that the level of facilities-based competition in those specific locations will ensure that market forces will protect the interests of consumers.[43]

The *Triennial Review Order* and the Commission's decisions in the Omaha and Anchorage forbearance dockets make it clear that wire center-specific evidence is essential to the Commission's Section 251(c)(3) forbearance analysis. Qwest has not justified a departure from this approach and, at the same time, it has not provided any factual evidence regarding the state of facilities-based local competition on a wire center-specific basis in the relevant MSAs. In the absence of this data, the Commission's only reasonable course of action is to dismiss Qwest's Petitions on the ground that Qwest has failed to sustain its burden of proof.

Qwest's "proof" is lacking in numerous additional important respects discussed more fully herein, including: (1) the failure to specify the extent to which the purported competition upon which Qwest relies is facilities-based (*i.e.*, does not rely on use of Qwest last-mile connections or interoffice transport); (2) the failure to specify the extent to which alternative fiber networks reach individual customer locations; and (3) the lack of information regarding the extent to which purported switched access line losses by Qwest were offset by increases in other Qwest-provided services.

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42 *Omaha Forbearance Order*, at n. 186.

43 *Anchorage Forbearance Order*, at ¶¶ 14, 16.

Importantly, Qwest should not be permitted to use the *ex parte* process to game this proceeding. Qwest's petitions should be evaluated and judged by the Commission as they were presented by Qwest at the time of filing.[44] After all, Qwest in its sole discretion determined the timing of its filings and the nature and extent of supporting data to include with its Petitions. If Qwest is permitted to offer additional empirical data through the *ex parte* process, parties with a critical interest in the outcome of this proceeding, and the Commission itself, will be forced to evaluate and respond to a moving target, and likely will not have a full and fair opportunity to address the new information.[45] As stated in the *Omaha Forbearance Order*, the Commission is under no obligation to evaluate a forbearance petition "otherwise than as pled."[46] Accordingly, the Commission should consider Qwest's Petitions as filed and, after doing so, dismiss them for failure to sustain their burden of proof.

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44 Qwest may be attempting to follow the example set by Verizon in its pending Section 251(c)(3) forbearance proceeding. Verizon withheld market-specific data to support its forbearance requests for six MSAs until the final day of the formal pleading cycle on its petitions. Various interested parties have moved the Commission to dismiss or, in the alternative, deny Verizon's petitions on the basis of this late-filed data. That motion is pending. *See* Motion to Dismiss or, in the Alternative, Deny Petitions for Forbearance on the Basis of Late-Filed Data, WC Docket No. 06-172 (filed May 22, 2007).

45 Allowing Qwest to submit more granular empirical evidence at this point in time (or in the future) would be highly prejudicial. Four months, representing one-third of the statutory period provided for evaluation of the forbearance requests, have passed since the Petitions were filed. Rather than allow Qwest to submit more granular information at this point – should Qwest seek to avoid dismissal through such a ploy – the Commission should dismiss the Petitions and allow Qwest to refile with more granular data, starting the 12-month statutory clock anew. In addition, the Commission should avoid a repetition of the highly-dubious 11th hour quest for additional decisional information undertaken recently by the Chief of the Wireline Competition Bureau with respect to a group of pending broadband forbearance petitions. *See* Letter from Thomas J. Navin, Chief, Wireline Competition Bureau, Federal Communications Commission to Susanne A. Guyer, Verizon, Melissa Newman, Qwest, Robert W. Quinn, Jr., AT&T, Jeffrey S. Lanning, Embarq, and Gregg C. Sayre, Frontier Communications, WC Docket Nos. 04-440, 06-125, 06-147 (Aug. 23, 2007). Such an effort disregards the rights of interested parties to review and comment on such evidence.

46 *Omaha Forbearance Order*, at n. 161.

IV. THE PETITIONS SHOULD BE DENIED ON THE MERITS BECAUSE QWEST HAS NOT MET ITS BURDEN OF PROOF THAT SUFFICIENT FACILITIES-BASED COMPETITION EXISTS WITHIN EACH RELEVANT MARKET

In the event that the Commission does not dismiss Qwest's Petitions, the Commission should deny Qwest forbearance from Section 251(c)(3)'s unbundling requirements. The burden of proof to justify forbearance falls squarely upon Qwest as the petitioning party,[47] and to meet the first two prongs of Section 10(a), Qwest must prove that enforcement of Section 251(c)(3) is not necessary to ensure that its charges and practices are just and reasonable and not unreasonably discriminatory, and that enforcement of Section 251(c)(3) is not necessary for the protection of consumers.[48] Qwest, for all practical purposes, has made no demonstration that sufficient facilities-based competition exists in the relevant markets to ensure that its rates and charges are just and reasonable and not unreasonably discriminatory and that enforcement of Section 251(c)(3) and the other provisions it requests forbearance from are not necessary for the protection of consumers, as required by Section 10(a).[49]

Critically, Qwest has failed to present its analysis in terms of the relevant geographic and product markets. It is *not* the burden of either the Commission or other interested parties to extrapolate this data, sort these issues out and, after identifying the relevant markets, to apply the hodgepodge of anecdotes and general information Qwest provided with its Petitions in an attempt to conduct the careful analysis Qwest chose not to undertake. And it is

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47 *See* Section II, *supra*.

48 47 U.S.C. § 160(a).

49 The Washington Utilities and Transportation Commission ("UTC") agrees with this conclusion. In its comments in response to Qwest's Petition for forbearance in the Seattle MSA, the UTC "recommends that the Commission deny the Seattle Petition because the scope of the relief Qwest requests would substantially impede or entirely eliminate intra-modal competition in the Seattle MSA." Comments of the Washington Utilities and Transportation Commission, WC Docket No. 07-97 (filed Aug. 29, 2007) ("*UTC Comments*"), at 1.

certainly not appropriate as a legal matter for the Commission to accept on blind faith Qwest's broad contentions regarding the level of competition in the MSAs at issue. Qwest has the burden of demonstrating that sufficient facilities-based competition *for each relevant product market* exists *in each relevant geographic market* before forbearance can be approved for network elements used to serve *that product market in that geographic market*. Even in Omaha, where the potential stakes were much smaller, the Commission made clear that there is no short-cut available to Qwest (or the Commission) when considering an issue of such wide-ranging importance.

A. Qwest's Analysis Inappropriately Ignores Relevant Geographic Markets

In each of its Petitions, Qwest treats the entire MSA as the relevant geographic market.[50] By this, Qwest appears to be suggesting that competition is ubiquitously sufficient throughout each MSA to justify forbearance and that no more-granular analysis is required. The *Omaha Forbearance Order* and the *Anchorage Forbearance Order* make it impossible to accept this contention without substantial proof. Indeed, as the petitioner in the Omaha forbearance proceeding, Qwest is no doubt aware of the Commission's use of wire centers in its analysis, yet it has made no effort to justify its failure to provide such information here. Qwest nowhere addresses why it believes the MSA is the appropriate geographic market. The only way Qwest could hope to substantiate its claims for forbearance, therefore, is to conduct the very analysis which it steadfastly avoids.

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[50] *See* Qwest Petition – Denver, at 1 ("Qwest Corporation ('Qwest') seeks forbearance from significant, burdensome regulation, particularly loop and transport unbundling and dominant carrier regulation throughout the Denver Metropolitan Statistical Area ("MSA") . . . .). *See also* Qwest Petition – Minneapolis-St. Paul, at 1; Qwest Petition – Phoenix, at 1; Qwest Petition – Seattle, at 1. Importantly, as discussed below, Qwest often blurs the distinction between the mass market and the enterprise market in order to support its argument that forbearance is appropriate in both markets.

Qwest attempts to demonstrate that it merits forbearance by providing a litany of *anecdotes regarding actual or would-be competitors that are or soon might be providing* competitive services in some piece-parts of the MSAs at issue.[51] Qwest offers an unconvincing hodgepodge of MSA-wide, state-wide, and even national information to support its Petitions, but such information is worthless to complete the sort of market-specific analysis required by Section 10. Central to its efforts, Qwest recites the names of many cable-based, wireless, Voice over Internet Protocol ("VoIP"), and CLEC providers purportedly offering competing services.[52] But upon examination, Qwest fails to meet its burden of proof because the information it provides does not further a meaningful market-specific analysis.

1. Qwest has provided no empirical evidence regarding the existence of facilities-based competition.

Qwest has utterly failed to show that the various competitive providers it lists represent a sufficient measure of facilities-based competition for the purpose of the Commission's forbearance analysis. It is unclear the extent to which any of these entities actually compete with Qwest in the relevant geographic markets *today* because Qwest has not attempted to make such a showing. Further, to the extent there is some actual competition, Qwest is silent regarding the extent to which these entities are providing service using their own

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51 *See, e.g.,* Qwest Petition – Denver, at 8 ("In sum, Comcast has extensive facilities in the Denver MSA capable of delivering mass market services."). *See also* Qwest Petition – Seattle, at 23 ("[t]here were approximately *** *** business lines associated with facilities-based CLECs in the rate centers in the Seattle MSA.").

52 *See, e.g.,* Qwest Petition – Seattle, at 16 ("Currently, there are at least 60 VoIP providers (excluding Qwest) serving the Seattle MSA including Vonage, Packet8, Skype, SunRocket and others."). *See also,* Qwest Petition – Denver, at 10 ("[V]arious major carriers such as Sprint PCS, T-Mobile, Verizon, Cricket and AT&T (formerly known as Cingular) all offer telephone services in the Denver MSA . . ."); Qwest Petition – Phoenix, at 11, 15; Qwest Petition – Minneapolis-St. Paul, at 11-12, 16.

facilities without dependence upon the very UNEs for which it seeks forbearance.[53] In the *Omaha Forbearance Order*, the Commission found it crucial that the primary competitor to Qwest was "successfully providing local exchange and exchange access services *without relying on Qwest's loops and transport.*"[54] The Commission stated emphatically that:

> Forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing "last mile" facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that is today benefiting customers in the Omaha MSA.[55]

Similarly, in the *Anchorage Forbearance Order*, the Commission found the extent to which ACS's competitor, GCI, has constructed last-mile facilities to be highly relevant to its forbearance analysis and limited its grant of forbearance to "those locations where the record indicates that GCI provides sufficient facilities-based competition to ACS to satisfy the forbearance criteria of section 10(a)."[56] The Commission in the *Anchorage Forbearance Order* reiterated:

> Forbearing from section 251(c)(3) or section 252(d)(1) of the Act where no competitive carrier has constructed substantial competing last-mile facilities capable of providing telecommunications services is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Anchorage study area.[57]

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53 *See* n. 38, *supra*, discussing the shortcomings of Qwest's Highly Confidential Exhibit 2.

54 *Omaha Forbearance Order*, at ¶ 64 (emphasis supplied).

55 *Omaha Forbearance Order*, at ¶ 60.

56 *Anchorage Forbearance Order*, at ¶ 21.

57 *Id.*, at ¶ 23.

Yet in its Petitions, Qwest provides no empirical evidence regarding the existence of facilities-based (*i.e.*, non-UNE or Qwest wholesale services-based) competition in each wire center in the four MSAs at issue. This absence of this data cannot be overlooked and demonstrates Qwest's failure to meet it burden of proof.[58]

2. The potential for competition does not justify the grant of forbearance.

The Commission has made clear in previous forbearance cases that the mere *potential* for competition does not justify the grant of forbearance. While the potential for competition may be a factor, a threshold of *actual* facilities-based competition is required.[59] In the *Omaha Forbearance Order*, the Commission concluded that although facilities coverage[60] is important to a Section 251(c)(3) forbearance determination, a retail market share requirement also must be met before forbearance in any wire center is appropriate.[61] The Commission expressed this point clearly when it stated:[62]

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58 In its comments, the UTC points to the existence of a number of wireline competitors in the Seattle MSA that "rely heavily, and in some cases solely, on the availability of loop and transport UNEs from Qwest to compete, particularly for enterprise customers" and notes that Qwest's "petition is relatively silent with respect to competitors' reliance on UNEs" in Seattle. *UTC Comments,* at 5, 8.

59 *Omaha Forbearance Order,* at ¶ 62.

60 Facilities coverage, as employed in the *Omaha Forbearance Order,* refers to whether a competing carrier "is willing and able within a commercially reasonable time" to provide a full range of services that are substitutes for the ILEC's local exchange services in each relevant product market to customers served by a specific wire center within the footprint of the ILEC. *Id.*, at ¶¶ 62, 69 (granting Qwest forbearance in the mass market in those Omaha wire centers where Cox's voice-enabled cable plant covers at least 75% percent of the end user locations in that wire center).

61 The retail market share requirement employed in the *Omaha Forbearance Order* refers to the number of local end users *actually* served by a competing facilities-based carrier, or the percentage of the retail local exchange market *captured* by a competing facilities-based carrier in each relevant product and geographic market. *Id.*, at ¶ 66 (examining the number of voice customers Cox has obtained). *See also id.*, at ¶ 67 (discussing the role of the wholesale market).

62 *Id.*, at ¶¶ 61-62.